



October 24, 2001

Ms. Melissa L. Perkins
Cooper & Scully
900 Jackson Street, Suite 100
Dallas, Texas 75202

OR2001-5189

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154578.

The City of Coppell (the "city"), which you represent, received a request for information relating to a city employee, including his personnel records and information relating to fire department internal investigations that involve or refer to him. You state that the city will release some of the requested information. You claim that portions of the remaining information are excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

We first note that the submitted documents include information that is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

¹We assume that the city requests our decision with respect to all of the submitted information, except for the documents that you specifically labeled as Exhibits 1 and 2. See Gov't Code § 552.301(e)(1)(D), (e)(2). It appears to this office that some of the submitted information was created after the date of the city's receipt of this request for information. Chapter 552 of the Government Code is not applicable to information that did not exist when this request for information was received. See Open Records Decision No. 555 at 1 (1990).

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (10), (13), (17). We have marked the types of information that are subject to section 552.022(a). The city must release these types of information, unless they are expressly confidential under other law or are part of a completed report, audit, evaluation, or investigation that is excepted from disclosure under section 552.108.

Section 552.108 of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

Section 552.108 protects information held by criminal law enforcement agencies. See Gov't Code §§ 552.108(a)(1), .108(b)(1). You indicate, however, that the information in question is held by the city fire department. You do not inform this office that the fire department is a law enforcement agency with authority to conduct a criminal investigation of the incident that is the subject of the submitted information. Section 552.108 also may be invoked by a proper custodian of information relating to an incident involving allegedly criminal conduct that is under active investigation or prosecution. See Open Records Decision No. 372 at 4 (1983). Although you assert that release of detailed information about a related investigation

would interfere with the prosecution of the employee, you do not represent to this office that any information obtained by the fire department has been provided to a prosecutor or that a prosecutor has asked the fire department not to release any of the information that it holds. Furthermore, the submitted documents indicate that the fire department holds the information in question for purposes of an administrative investigation only. The documents reflect that the subject of the investigation received a *Garrity* warning that statements obtained from him by the department would not be used in any criminal prosecution. *See Garrity v. New Jersey*, 385 U.S. 493 (1967).² We therefore conclude that the information held by the fire department that relates to the pending prosecution is not excepted from disclosure under section 552.108. *See also Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that does not result in a criminal investigation or prosecution); Open Records Decision No. 350 (1982).

The city also raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that other statutes make confidential. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The city must withhold the submitted W-4 form under section 6103(a) of the Internal Revenue Code.

Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in relevant part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only under certain specified circumstances. *See also* Open Records Decision No. 565 (1990).

You claim that responsive psychological records are confidential under section 611.002. You also assert that some of these records are excepted from disclosure because the subject of the records waived any right of access to them. We disagree. A governmental body

²The United States Supreme Court said in *Garrity* that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." 385 U.S. at 500.

cannot close information to the public simply by entering into a contractual provision that prohibits disclosure, unless the governmental body has explicit authority to do so. *See* Open Records Decision No. 514 at 1 (1988); *see also* Open Records Decision No. 283 at 2 (1981). You do not demonstrate to this office that the city has such authority. We have marked the submitted information that is confidential under section 611.002 of the Health and Safety Code. The city must withhold the marked information under section 611.002, unless the requestor has a right of access to this information under sections 611.004 and 611.0045.

Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The submitted records contain information relating to polygraph examinations that section 1703.306 makes confidential. The requestor is not a person to whom section 1703.306 grants access to this information. We have marked the information that the city must withhold under section 1703.306 of the Occupations Code.

The Medical Practice Act (the "MPA") governs the disclosure of medical records. The MPA is codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b)-(c). The MPA includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We have marked the information that is governed by the MPA. The city may release this information only if the MPA permits the city to do so.

You also claim that some of the requested information is protected by constitutional and common law rights of privacy under section 552.101. Constitutional privacy protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). The determination of whether information is protected by the disclosural strand of constitutional privacy requires a balancing of the individual's privacy interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492). Having considered your arguments, we conclude that none of the information at issue is protected by a constitutional right of privacy.

Information is protected by common law privacy under section 552.101 when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The subjects deemed to be intimate or embarrassing in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See* 540 S.W.2d at 683. This office has

since concluded that other subjects also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999); *see also* Open Records Decision Nos. 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The test of privacy under section 552.102 is the same as the test under section 552.101 in conjunction with *Industrial Foundation*. However, because of the greater legitimate public interest in matters involving employees of governmental bodies, privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature." *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, public employee privacy under section 552.102 is "very narrow." *See* Open Records Decision No. 400 at 5 (1983).

You argue that information concerning the employee's off-the-job conduct is protected by common law privacy. We conclude that this information is not private under sections 552.101 and 552.102. *See* Open Records Decision Nos. 611 at 1 (1992) (assault by one family member on another is a crime, not a family matter normally considered private); *see also* Open Records Decision Nos. 444 at 5 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, or promotion of public employee), 423 at 2 (1984) (information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing). We have marked other information, however, that is private and must be withheld under sections 552.101 and 552.102.

Common law privacy also protects certain kinds of personal financial information. In prior decisions, this office has determined that although financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan), 523 at 3-4 (1989) (certain financial information contained in loan files of veterans participating in Veterans Land Board programs), 373 at 3-4 (1983) (certain financial information contained in housing rehabilitation grant application files). We have marked the personal financial information that is private and must be withheld under section 552.101.

Section 552.117(1) of the Government Code excepts from public disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the employee has family members, *if the current or former employee requested that this information be kept*

confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). This information may not be withheld, however, in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989).

You point out that the submitted documents contain the social security numbers of other employees of the city who have elected non-disclosure of personal information under section 552.024. Assuming that these other city employees made a timely election under section 552.024, the city must withhold their social security numbers under section 552.117(1). You do not inform us, however, of whether the employee who is the principal subject of the requested information made a timely section 552.024 election. If the employee did so, then the city also must withhold all information that is encompassed by his section 552.024 election under section 552.117(1). We have marked the section 552.117 information relating to this employee that the city may be required to withhold.

A social security number also may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 at 2-4 (1994).* It is not apparent to this office that any social security number contained in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no other law, and we are aware of no law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number contained in the submitted documents was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See Gov't Code §§ 552.007, .352.* Therefore, before releasing a social security number, the city should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

The submitted documents also contain driver's license and license plate information. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1)-(2). The city must withhold the marked Texas driver's license and license plate numbers in accordance with section 552.130.

Lastly, we note that the Seventy-seventh Legislature recently added section 552.136 to chapter 552 of the Government Code.³ This newly enacted exception to public disclosure makes certain account number information confidential. Senate Bill 694 was passed on May 14, 2001, became effective when it was signed by the Governor on May 26, 2001, and provides in relevant part:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). We have marked account number information that the city must withhold under section 552.136 of the Government Code. We note, however, that another account number pertains to a bank account to which the requestor is a party. The requestor has a special right of access to that account number under section 552.023.⁴

³The Legislature also enacted two other bills that add a section 552.136 to chapter 552. House Bill 2589 makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Sess. Law Serv. 974, 975 (Vernon) (to be codified as Gov't Code § 552.136). Senate Bill 15 makes information maintained by family violence shelter centers confidential. *See* Act of May 3, 2001, 77th Leg., R.S., ch. 143, § 1, 2001 Tex. Sess. Law Serv. 279 (Vernon) (to be codified as Gov't Code § 552.136). Senate Bill 694 also enacted the same language as House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code. *See* Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (to be codified as Gov't Code § 552.137).

⁴Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."

In summary, the submitted documents contain information that is confidential under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; section 611.002 of the Health and Safety Code; and section 1703.306 of the Occupations Code. The Medical Practice Act governs the release of medical records. Other contents of the documents are protected by common law privacy under sections 552.101 and 552.102. A city employee's home address, home telephone number, and social security number, and information that reveals whether the employee has family members, must be withheld under section 552.117(1) if the employee made a timely election under section 552.024. A social security number also may be confidential under section 552.101 in conjunction with federal law. Texas driver's license and license plate information must be withheld under section 552.130. Account number information must be withheld under section 552.136, with the exception of the information to which the requestor has a right of access under section 552.023. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

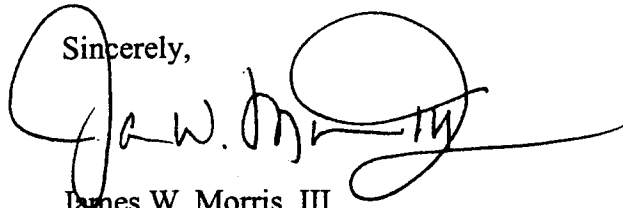
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 154578

Enc: Submitted documents

c: Ms. Christi Hester
143 Glenwood Drive
Coppell, Texas 75019
(w/o enclosures)